ILE COPY

72-37

Supreme Court, U. S.
FILED
JUL 6 1972
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1972

No. .....

RICHARD HOFF,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN CRIMINAL ACTION

PAUL RAO, JR.,
Attorney for Petitioner,
233 Broadway,
New York, N. Y. 10007.
964-8866

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions, Statutes and Rules Involved	3
Statement of Facts	3
Reasons for Granting the Writ	5
Argument on Question 1	5
Arguments on Question 2	19
Conclusion	36

Appendix to Petitioner's Brief

Appendix A—Judgment of United States Court of Appeals	A1
Appendix B—Statutes	B1

Cases Cited

Allen v. United States, 164 U. S. 492 (1896) 19, 25, 27

Berger v. United States, 295 U. S. 78 (1935) 14

Billeci v. United States, 184 F. 2d 394 (D. C. Cir. 1950) 31

Bollenback v. United States, 326 U. S. 607 (Frankfurter, J.) 30

PAGE

Green v. United States, 309 F. 2d 852 (5th Cir. 1962) 19, 27

Hibdon v. United States, 204 F. 2d 834 (6th Cir. 1953) 31

Huffman v. United States, 297 F. 2d 754 (5th Cir. 1962) 22, 23, 24, 28, 29, 33, 35

Jenkins v. United States, 330 F. 2d 220 (D. C. Cir. 1964) 23

Powell v. United States, 297 F. 2d 318 (5th Cir. 1961) 25, 30

Quiles v. United States, 344 F. 2d 490 (9th Cir. 1965) 9

Shepard v. United States, 290 U. S. 96 18

Southwestern Publishing Co. v. Horsey, 230 F. 2d 319 (9th Cir. 1956) 18

Spencer v. State of Texas, 385 U. S. 552 (1967).... 18

State v. Goebel, 36 Wash. 2d 367, 218 P. 300 (1950) 6

Thaggard v. United States, 354 F. 2d 735 (5th Cir 1966) 23, 24, 28, 29, 32

Theobald v. U. S., 371 F. 2d 769 (9th Cir. 1967) 9

Thompson v. Utah, 170 U. S. 343 31

United States v. Bozza, 365 F. 2d 206 (2nd Cir. 1966) 6

United States v. Brown, 411 F. 2d 930 (1969)..... 19

United States v. Byrd, 352 F. 2d 570 (2nd Cir. 1965) 10

PAGE

United States v. Deaton, 381 F. 2d 114 (2nd Cir. 1967) 13

United States ex rel. Drew v. Meyers, 327 F. 2d 174 3rd Cir. 1964) 12

United States ex rel. Durso v. Pate, 426 F. 2d 1083 (7th Cir. 1970) 12

United States v. Dutsch, 357 F. 2d 331 (4th Cir. 1966) 8

United States v. Fioravanti, 412 F. 2d 407 (1969) 19, 23, 25, 26, 27, 31, 32

United States v. Jones, 374 F. 2d 414 (2nd Cir. 1967) 17, 18

United States v. Kenner, 354 F. 2d 780 (2nd Cir. 1965) 34, 35

United States v. Knaack, 409 F. 2d 418 (1969)..... 22

United States v. Knohl, 379 F. 2d 427 (2nd Cir. 1967) 16

United States v. Phillips, 401 F. 2d 301 (7th Cir. 1968) 13

United States v. Ravich, 421 F. 2d 1196 (2nd Cir. 1970) 8, 9

United States v. Rogers, 289 F. 2d 433 (4th Cir. 1961) 32

United States v. Sawyers, 423 F. 2d 1335 (1970) 19, 28, 29, 30

United States v. Smith, 303 F. 2d 341 (4th Cir. 1962) 33

United States v. Stirone, 262 F. 2d 571 (3rd Cir. 1958) 14

United States v. White, 382 F. 2d 445 (7th Cir. 1967) 21

PAGE

United States v. Wynn, 415 F. 2d 135 (1969) 20

Watson v. United States, 234 F. 2d 42 (D. C. Cir. 1956 11

Williamson v. United States, 365 F. 2d 12 (5th Cir. 1966) 35

Authorities Cited

United States Constitution:

Article III, Sec. 2, Clause 3 .....2, 31, 32, B1

Fifth Amendment 3, B1

Sixth Amendment 2, 3, 28, B1

Statutes:

18 U. S. C. 659 ..... 3, B2

28 U. S. C. 1254(1) 2, 3, B4

Federal Rules of Criminal Procedure:

Rule 52(b) 3, B4

Treatises Cited

C. J. S. Evidence:

Sec. 2, pp. 815, 816 9

Sec. 158, p. 426 13

Sec. 159, p. 433 15

Mathes and Devitt, Federal Jury Practice and Instruction:

Sec. 7.01 33

PAGE

1 Matthews, How to Try a Federal Criminal Case:
Sec. 462, p. 639 6

McCormick, Evidence 1954:
p. 327 15
p. 329 11
p. 331 11
p. 332 15

Moore's Federal Practice:
Vol. 8, Par. 31.-04, pp. 31-7 32

1 Wigmore Evidence:
3rd Ed. 1940, Secs. 28, 29 14

2 Wigmore Evidence 3rd Ed. 1949:
p. 200 11
Sec. 302, p. 196 14

Wigmore on Evidence:
Vol. 4, 3rd Ed. Sec. 1157, p. 253 8

2 Wright, Federal Practice and Procedure:
Sec. 410, pp. 125, 126 ..... 5, 6
Sec. 502, p. 360 19

Miscellaneous

"Progress of Project Effective Justice", Mr. Justice Tom Clark, as Chairman of the Joint Committee for the Effective Administration of Justice, before the American Judicature Society, August 14, 1963 19

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

RICHARD HOFF,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN CRIMINAL ACTION

Petitioner Richard Hoff prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his judgment of conviction after a jury trial in the Southern District of New York under 18 U. S. C. 659, Interstate or Foreign Shipments by Carrier; State Prosecutions.

Opinions Below

There was no formal opinion by District Judge Charles M. Metzner and judgment of conviction was affirmed without opinion by the Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit, affirming the judgment of conviction of Appellant, was entered on June 14, 1972. This petition for certiorari

was filed less than thirty days from the date aforesaid. The jurisdiction of this writ is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Government counsel during the two hours of the direct case proffered testimony, both physical and oral, as to two distinct and separate "prior similar acts" which were ultimately held inadmissible by the Trial Court. The question is: Did this bolstering of the Government's case by proffering that which could not be legally proven prejudice the jury by innuendo in persuading it that the defendant was a "bad man" and must have committed the crime in question, thereby depriving him of his constitutional right to a fair trial.

2. Constitutional questions are presented by the so-called Allen charge in this case:

(a) Whether the inaccurately revised Allen charge utilized here, containing incorrect statements of law, a totally imbalanced majority/minority direction, disproportionate judicial interference in deliberations and no unequivocal disclaimer of compulsion by the Trial Court, constituted such coercion as to be violative of the defendant's constitutional guarantees to a trial by an impartial jury under the Sixth Amendment; and

(b) Whether the version of the Allen charge presently used in this circuit has become so constitutionally delinquent in derogation of the defendant's traditional right to a trial by jury under Article III, Sec. 2, Clause 3 of the United States Constitution as to directly affect the presumption of innocence and the necessity of proving the defendant guilty beyond a reasonable doubt.

Constitutional Provisions, Statutes and Rules Involved

This case involves the Fifth and Sixth Amendments to the United States Constitution, Article III, Sec. 2, Clause 3 of the United States Constitution, 18 U. S. C. 659, 28 U. S. C. 1254(1) and Rule 52(b) of the Federal Rules of Criminal Procedure. The texts are printed in the Appendix to this Petition in pp. B1-B4.

Statement of Facts

The defendant, Richard Hoff, who had never before been convicted of a crime, operated a store in the Chelsea area of Manhattan selling electrical and other devices. He was indicted on September 30, 1971, for a violation of Title 18, Section 659 of the United States Code on the basis of the fact that stolen merchandise was found in a loft in the immediate neighborhood of his store.

The Government presented in their case the testimony of F.B.I. Agent Colgan, who had found the merchandise in the loft in question and had made the arrest. He testified that defendant had said he had no knowledge of the loft and had no key to it. Then a real estate broker, Mr. Cohen, testified that, at the request of the defendant, in February of 1971, he had located the space in question and had showed him the loft and made out the lease application in the presence of the defendant but in the name of one Peter Gordon, whose address the defendant had supplied. He testified that he had received a deposit of $100.00 from the defendant and thereafter delivered the lease itself to the defendant, and subsequently collected the monthly rent from the defendant from March to July of 1971 Another real estate management agent, a Miss Solove, was brought in by the Government to show the non-existence of a Peter Gordon at the address which

was listed as his home in the lease. The Government's next witness, Mr. Gatling, a locksmith, testified that the defendant had employed his services to put a lock on the loft, and that he thereafter gave the keys to the defendant.

The Government, prior to the testimony of the F.B.I. agent, its first witness, who arrested this defendant, had brought into the courtroom, as will be more fully documented and explained later on some of the eleven boxes of knit goods for which the defendant had been indicted and which had been found in the loft, and one other box of merchandise, identified by an F.B.I. agent as Icelanche Lumijets, for which the defendant had never been indicted, but which had been found in the loft. This extraneous box was first characterized by the Court in the presence of the jury as relating to "prior similar acts", and was again so characterized by the prosecutor in the presence of the jury. After repeated objections this proffer of evidence was excluded and the box was removed from the courtroom.

At the end of its case, the Government brought in another witness, who identified himself as a retired enforcement officer from the United States Customs, and stated his duties were the prevention of the unlawful removal of merchandise from the foreign trade zone in Staten Island. This witness was to be used to lay the foundation for the introduction of another "prior similar act" which involved the arrest of the defendant a year before the charge in the indictment, and concerning which the defendant testified in the grand jury, which had refused to indict. Government counsel, after the jury again heard the words from the Court of "a prior similar act", which were confirmed by the prosecutor's statement "That's right", was directed by the Court upon the request of defense attorney to submit an offer of proof at the bench and defense coun-

sel's objection was thereafter finally sustained, but only after the character and purpose of the witness was made clear to the jury. A request by defense counsel to the Court to instruct the jury to disregard the testimony was denied.

Defendant's case consisted of both his testimony and that of a local fellow merchant. Both testified as to the identity of the lessee, Peter Gordon, his presence in the area, his activities and type of business, and the defendant further explained his financial motivation in negotiating on behalf of Gordon for the leased premises.

The trial of the entire action was extremely brief. The Government's case lasted approximately two hours, the defendant's case about one hour. The next trial day, the summations and charge lasted less than an additional hour and one quarter. The jury's deliberation lasted for approximately three hours before a note was received that they could not arrive at a verdict. The Court thereupon, without revealing the contents of the note, called in the jury and delivered a so called Allen charge and immediately returned the jury to its deliberation. Two and one half hours later a guilty verdict was returned. On February 23, 1972, Judge Metzner sentenced the defendant to one year imprisonment.

Reasons for Granting the Writ

Argument on Question 1

The scope and purpose of testimony concerning prior similar acts is limited, irrespective of whether a given circuit follows the exclusory or inclusory rule. 2 Wright, Federal Practice and Procedure, sec. 410, pp. 125, 126. As to the character of proof necessary for a prior similar act, various circuits have used different guidelines: clear

and convincing, plain and conclusive, substantial relevancy, and probative value should outweigh prejudicial effect. However, it is universally accepted that the character of proof should not be so vague and uncertain, as merely to create suspicious circumstances and thereby persuade the jury to convict the defendant only because they believe him to be a bad man. 2 Wright, ibid. Most significantly, it is certainly elementary that "the government should not offer evidence of similar offenses unless it has carefully weighed the circumstances of the instant case, and the applicable decisions because of the naturally prejudicial effect of such testimony." 1 Matthews, How to Try a Federal Criminal Case, sec. 462, p. 639.

Involved herein are two instances as to the proffering of evidence relative to two separate "prior similar acts", which acts were in fact held inadmissible by the Trial Court but the full import of which crept into the record and created in the mind of the jury situations "where the minute peg of relevancy" was "entirely obscured by the dirty linen hung upon it." *State* v. *Goebel,* 36 Wash. 2d 367, 379, 218 P. 2d 300, 306 (1950), cited with approval in *United States* v. *Bozza,* 365 F. 2d 206, 214 (2nd Cir. 1966).

(a) The first instance involved the physical presence in the courtroom of a large carton of merchandise within plain view of the jury, which carton was found in the same loft and at the same time as were the eleven cartons mentioned in the indictment, but which contained different merchandise and for which the defendant had not been indicted. This extraneous carton was on the floor with those relating to the crime for which the defendant was indicted.

Defense counsel objected to the presence of this large carton and stated,

> "Your Honor, I am saying if there are boxes here that are not part of the eleven they shouldn't be here."

The Trial Court responded,

> "They may have a question of similar acts, Mr. Rao."

After the carton not mentioned in the indictment was marked Government's Exhibit 2 for identification, an F.B.I. Agent Colgan, in response to a question by the prosecutor as to "whether you recognize" this Government's exhibit, answered,

> "Yes. This is one of 38 similar cartons containing Icelanche Lumijets."

Defense counsel again objected, objection was sustained; defense counsel stated it was "highly prejudicial", and the Court responded, "not yet, it is not" and then overruled the objection. The Government then offered it in evidence, an objection was sustained, and in the presence of the jury the Government counsel said,

> "Your Honor, I think we are entitled to show similar acts in connection with other merchandise found in the room."

Defense counsel objected again and the Court stated:

> "If you thought they were stolen you should have indicted him for them at the same time."

All of this was done in the presence of the jury. Later on, out of the presence of the jury, the prosecutor said he would "look into simultaneous similar acts", as a rationale for introducing this carton into evidence, but this legal position was never substantiated.

As to this first instance, the bringing into the courtroom of the extraneous carton, it is apropos in evaluating the effect on the jury to quote Wigmore on Evidence, Vol. 4, 3rd Ed. Sec. 1157, p. 253, which states:

> "What is called real evidence is of much value in receiving attention . . . they look so solid and important that they give stability to the rest of the story. The mind in doubt ever turns to tangible objects."

This presentation of patently inadmissible evidence violates the principle of *United States* v. *Dutsch*, 357 F. 2d 331, 333 (4th Cir. 1966), where the prosecutor attempted to "bolster his case" with the offer of "inadmissible testimony". There was no acceptable legal theory under which this evidence could have been received, and it most certainly did not constitute an instance of a "prior similar act". The Government attorney had in fact misinformed the Court as to the legal basis for the presence of this carton in the courtroom. The effect of its presence on the jury is parallel with the situation in *United States* v. *Ravich*, 421 F. 2d 1196 (2nd Cir. 1970). The Circuit Court there said at p. 1204 as to the presence of such evidence in the courtroom that:

> "If the physical evidence was offered only to prove that defendants were the sort of persons who carried guns, and therefore were more likely than most to have committed an armed robbery, it might run afoul of the familiar rules that the prosecution may not introduce evidence of criminal character or generally of the commission of a crime on one occasion to prove the commission of a crime on another."

In this case, the parallel is that the physical evidence was offered to prove that the defendant was the sort of

person who received stolen merchandise and was more likely than most to knowingly receive stolen merchandise, so that the "familiar rules" mentioned above were violated.

The Court further said in *Ravich*:

> ". . . the trial judge would have been justified in excluding" (the physical evidence) "if he decided that their probative value was outweighed by their tendency to confuse the issues or inflame the jury. He might well have done so in this case, in view of the overwhelming evidence that the defendants were the robbers, the rather small addition which the guns provided, and the undoubted effect on the jury of seeing all this hardware on the table."

In this case, the parallel with Ravich would run exactly as follows as to exclusion: The sufficiency of evidence that the defendant was a receiver of stolen property, the rather small addition the extraneous carton provided, and the undoubted effect on the jury of seeing and hearing about this carton characterized as a "prior similar act," placed in the courtroom and identified from the witness stand.

In violation of the principle stated in *Quiles* v. *United States*, 344 F. 2d 490 (9th Cir. 1965), the prosecutor abused his discretion, thereby affecting the substantial rights of the defendant, because of his improper conduct in raising "innuendos" about more than could be legally proven. Since "Evidence is that which may be properly considered by the Court or submitted to the jury for its consideration", and competent evidence is that "which tends to establish the fact in issue and does not rest on mere surmise or guess". C. J. S. Evidence Sec. 2, pp. 815, 816, the Trial Court in this case was obviously compelled to exclude this extraneous carton, since its probative value was clearly outweighed by the prejudicial effect of confusing and influencing the jury. *Theobald* v. *U. S.*, 371 F. 2d 769 (9th Cir. 1967).

In *United States* v. *Byrd*, 352 F. 2d 570, 574 (2nd Cir. 1965), the Court stated:

> "From the quality of proof standpoint for proving knowledge and intent, its probative value was largely cumulative. The evidence came from the mouth of the same witness, Kaufman, who testified to the occurrences in the first two counts. If the jury believed his testimony as to those counts, the relating of the Sandburg incident added little, if anything, to a revelation of Byrd's state of mind. If they had disbelieved Kaufman's testimony about the first two counts, it is not very likely they would have believed his story about the Sandburg tax audit."

In this case, the witness was an F.B.I. agent who testified regarding the initial eleven cartons for which the defendant was indicted. If the jury believed his testimony with reference to the eleven cartons, the testimony as to the other and extraneous carton would have added nothing to a revelation as to the defendant's state of mind. If the jury disbelieved the evidence given on the eleven cartons in the indictment found in the loft, it is not very likely that they would have believed his story on the other carton.

As the Court stated in *United States* v. *Byrd, supra*, p. 575, as to the need for such evidence in the Government's main case,

> "Nor did the Government suffer from a lack of evidence of intent . . . there was therefore no pressing necessity that evidence of that prior occasion be offered on the Government's main case."

The same is true here. Agent Colgan testified as to the merchandise in the loft, the real estate agent Cohen testified that Hoff personally saw the loft, personally rented the

loft from him and paid rent for it, a witness Gatling testified that he was asked by the defendant to put a lock on the loft and after doing so he gave the keys to the defendant. There was patently no need for the introduction of this extraneous evidence. Its use was solely prejudicial. But, Government Counsel proceeded to prejudice the jury, and ignored the obvious and compelling rule clearly stated in *Watson* v. *United States*, 234 F. 2d 42, 45 (D. C. Cir. 1956). "Government counsel must exercise thoughtful restraint having in mind possibly prejudicial error."

McCormick, Evidence 1954, p. 331, states:

> "When the crime charged involves the element of knowledge, intent or the like, the state will often be permitted to show other crimes in rebuttal, after the issue has been sharpened by the defendant's giving evidence of accident or mistake, more readily than it would as part of its case in chief at a time when the Court may be in doubt that any real dispute will appear on the issue."

However, in this case, the other alleged crime was offered in the Government's direct case. Although it is true, according to 2 Wigmore Evidence, 3rd Ed. 1949 at p. 200, "the prior doing of other similar acts whether clearly part of a scheme or not is useful in reducing the possibility that the act in question was done with innocent intent", this was not a prior act *per se*, but an act which, the Trial Court pointed out, the defendant should have been indicted on, so that "the man could have answered it as a charge". The prosecutor attempted, without any legal justification, to do what McCormick, Evidence 1954 at p. 329, states should be done only under the proper circumstances:

> "Evidence of other crimes is admissible to show by similar acts or incidents that the act on trial was

> not inadvertent, accidental, unintentional or without guilty knowledge."

The prosecutor here should have had the requisite knowledge of the inadmissibility of this extraneous evidence, and therefore should not have attempted to introduce it in the view and hearing of the jury. In so doing, he was accomplishing indirectly what he could not do directly. The prejudicial character of what he did far outweighed any potential probative value. (*United States ex rel. Durso* v. *Pate,* 426 F. 2d 1083 (7th Cir. 1970).) As the Court stated in *United States ex rel. Drew* v. *Meyers,* 327 F. 2d 174, 180, 181 (3rd Cir. 1964) in reference to the "fair play" of the prosecutor:

> ". . . for although the prosecutor must have a large measure of discretion in presenting his case, manifestly he is a quasi judicial officer and should be motivated by a judicial attitude."

(b) The second instance involved the producing of a witness Jeremiah Sullivan for the purpose of proving a prior similar act, which was different from that of the extraneous carton mentioned in part (a) of this question. The Court, in response to defense counsel's objection to this testimony, queried: "Prior similar acts?", and the Government's counsel responded: "That's right, Your Honor." Defense counsel again objected, and the Court overruled the objection. The witness, who identified himself as an enforcement officer from the United States Customs, then testified,

> "My duties was to see that there was no unlawful removal of merchandise after hours, which was my only duty from 12 to 8 A.M."

Defense counsel asked,

> "Could there be an offer of proof before it becomes very prejudicial?"

and the Court granted it at the bench. When the Court was informed by defense counsel that:

> "This matter revolved around an arrest that was made approximately a year ago. This matter was presented to the grand jury. The defendant testified before the grand jury. The grand jury refused to indict in this matter",

the Court then asked Government counsel,

> "Wait a second. Are you putting in prior similar acts where the grand jury refused to indict?",

and thereafter sustained the objection.

In *United States* v. *Phillips*, 401 F. 2d 301, 306 (7th Cir. 1968), the Court stated:

> "If the proffered evidence does not have substantial relevance outweighing its potentially unduly prejudicial effect, its admission is an abuse of discretion", so that "the probative value" must not be "far outweighed by its prejudicial effects".

This second attempt to introduce testimony as to a "prior similar act" was not designed for the purpose of rebuttal testimony, had no probative value whatsoever and defense counsel did "object" to the introduction of such evidence, as he did in the first instance.

> "An offer of a party to prove a fact in evidence involves an assertion by him that such a relation exists in reason as a matter of logic, between the fact offered and the fact in issue, that the existence of the former renders probable or improbable the existence of the latter and the relationship thus asserted is truly relevant." C. J. S. Evidence, Sec. 158, p. 426.

Considering that introduction of a prior similar crime is potentially prejudicial evidence, *United States* v. *Deaton*,

381 F. 2d 114 (2nd Cir. 1967), there is involved here a question of balancing the probative value against the prejudicial value of the evidence. "Legal relevancy denotes 'something more than a minimum of probative value' ". 1 Wigmore Evidence, 3rd Ed. 1940, Secs. 28, 29. Thus, if grand jurors, after hearing the testimony of a defendant, refused to indict on a charge for which the defendant was arrested because there was no probable cause, how then could a trial juror be asked to consider the proffered evidence on a more than minimum probative value basis? How could a trial juror be asked to consider these sets of facts without the prejudicial value of the evidence obviously outweighing the questionable probative value? This type of conduct by Government counsel is explicitly forbidden in *Berger* v. *United States*, 295 U. S. 78, 88 (1935):

> "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

A prior similar act is admissible on the basis of intent, for 2 Wigmore Evidence, Sec. 302, p. 196, "Multiplication of incidents tends to negative any element of innocent intent." However, this legally admissible result cannot be accomplished by legally inadmissible means. To accomplish this negation of innocent intent through an inadmissible prior similar act is to prejudice the jury. In *United States* v. *Stirone*, 262 F. 2d 571 (3rd Cir. 1958), the Court stated at p. 576:

> "Anyone obligated to determine the guilt or innocence of a defendant charged with a particular crime invariably would be influenced by a showing that the defendant committed crimes in general."

In the instant case, such was the effect of the proffer of inadmissible testimony by the prosecutor, who improperly tried to eliminate the doctrine of chance by improperly bringing before the jury incompetent evidence as to a so-called "prior similar act". In doing this, the prosecutor confused and misled the jury for the proffered testimony served no purpose except to arouse the passion, prejudice or sympathy of the jury. C. J. S. Evidence, Sec. 159, p. 433.

McCormick, on Evidence, op. cit. 1954, p. 327, states:

> "Evidence of another crime may be introduced if, though, only if, it is substantially relevant for some other purpose than to show a probability." (Authorities cited.)

In this instance the alleged evidence could *only* show probability. As Dean McCormick had pointed out, Evidence, op. cit. 1954, p. 332,

> "The problem is not merely one of pigeon-holding, but one of balancing on the one side, the actual need for the other crime's evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other crime's evidence in the light of the evidence available to the prosecution."

Here there was no actual need for the other crime's evidence, considering the evidence that was available. There was no convincingness of the evidence, for a grand jury refused to indict, and there could have been no probative proof that the accused was the actor for the same reason. Thus, in fact, there was an inherent weak-

ness as to the other crime's evidence proffered here, and all of this, which was deliberately done, did unfairly prejudice the jury. This, indeed, was the case "where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *State* v. *Goebel, supra.*

In *United States* v. *Knohl,* 379 F. 2d 427 (2nd Cir. 1967), the Court stated at p. 438:

> "Even in cases in which the evidence is offered to prove one of the enumerated exceptions to the general rule, its probative value may be very slight while its prejudicial character may be very strong. Under such circumstances, the trial judge has a duty in the exercise of his discretion to exclude it."

The trial judge did exclude the evidence in this case but it had in fact been called to the attention of the jury on *five* occasions. The Court further stated in the *Knohl* case at p. 439,

> "Any prejudice the defendant may have suffered from this evidence was more than compensated for by the judge's charge."

In reference to Mr. Sullivan's testimony, when defense counsel asked the Trial Court to instruct the jury to "disregard what the testimony was", the judge's reply was

> "so far he has given nothing but his address and where he worked",

whereas in fact the witness who had identified himself as an enforcement officer for the United States Customs and stated,

> "My duty was to see that there was *no unlawful removal of merchandise* after work, which was my only duty from 12 to 8 A.M." (emphasis supplied)

Therefore, as to these two instances (a) and (b), regarding the proffering of inadmissible evidence, reference is made to *United States* v. *Jones*, 374 F. 2d 414 (2nd Cir. 1967), wherein it was contended that a certain word had crept into the record thereby revealing the whole situation to the jury. In that case, unlike here, the trial court went to extraordinary lengths to keep that word from creeping into the record. The Circuit Court, in reviewing the prejudicial word which had entered in despite this caution, stated at p. 419:

> "If this were important, we would be inclined to hold that this was insufficient to place the earlier crime before the jury, so that appellants were convicted because of this rather than the evidence of the instant offense. We could not, however, waste much time in speculating how much the jury did in fact divine, for the fact of the conviction was relevant and material."

In the present case, we cannot condone what happened by stating that "in spite of all precautions" the objectionable material crept into the record. There were no such precautions. More than a word or a phrase was said to the jury: on three occasions from the judge, and on one occasion from the prosecutor, the jurors heard "prior similar acts", saw inadmissible physical evidence in the courtroom, heard an F.B.I. witness testify that the extraneous carton contained Lumijets flashlights, and heard another witness identify himself as an enforcement officer from Customs and testify "my duty was to see that there was no unlawful removal of merchandise", so that all this was more than sufficient "to place the earlier crimes before the jury". Thus, this proffering of inadmissible evidence did prejudice the defendant, because these two "prior similar acts" were not sufficiently probative to be relevant or material, so that it is submitted that the Appellate Court could

and should have speculated on how much the jury did in fact divine.

In *Southwestern Publishing Co.* v. *Horsey*, 230 F. 2d 319 (9th Cir. 1956), the Court in its opinion found it significant, in assessing the prejudicial effect of inadmissible evidence, that the trial, as here, was relatively short. The prejudicial evidence there concerned a loss of esteem, similarly the evidence here affected a loss of esteem for the defendant. The effect in both cases was to prejudice the jury. As Judge Cardozo said in *Shepard* v. *United States*, 290 U. S. 96, 104, "The reverberating clang of those accusatory words would down all weaker sounds. It is for ordinary minds that our rules of evidence are framed."

In *Spencer* v. *State of Texas*, 385 U. S. 552, 563 (1967), the Supreme Court stated:

> "Cases in this court have long proceeded on the premise that the due process clause guarantees the fundamental element of fairness in a criminal trial."

The misconduct of government counsel clearly demonstrates that there are no established norms for the offering of evidence as to prior similar acts in jury trials. The method adopted by government counsel here, represents a mockery of acceptable legal principles and eroded defendant's constitutional guarantees. Not only was the defendant characterized as a bad man by innuendo, but evidence of other "crimes" though inadmissible bolstered the government's case. The failure of the Court of Appeals to apply its own decision, *United States* v. *Jones*, 374 F. 2d 414 (2d Cir. 1967), or even to render a written opinion shows that this area has become so ill defined that the Supreme Court should establish essential guidelines as to the offering of evidence by government counsel in such highly prejudicial circumstances.

Arguments on Question 2

The use of the Allen charge today is under general attack. Although the Supreme Court approved the Allen charge over 76 years ago, *Allen* v. *United States*, 164 U. S. 492 (1896), "its ultimate demise seems clearly indicated". Wright, *Federal Practice and Procedure*, Sec. 502, p. 360. A unanimous court in *Green* v. *United States*, 309 F. 2d 852, 854 (5th Cir. 1962) condemned the Allen charge in virulent terms echoing a Colorado court's characterization of it as a juridical "third degree", and a New Mexico court's description of it as a "shotgun instruction", stating: "There is small, if any justification for its use". Mr. Justice Tom Clark, as Chairman of the Joint Committee for the Effective Administration of Justice, stated before the American Judicature Society, August 14, 1963, in the report of that Joint Committee under the title *"Progress of Project Effective Justice"*,

> "nor do we circulate the Allen charge to the new Judges as I used to do when heading up the criminal division in the Department of Justice. Allen is dead and we do not believe in dead law."

If the charge is to continue in use, guidelines are needed in this area by the Supreme Court in the admissible or nonadmisisble content of the charge. Evidence of the excesses to which the charge has been put can be found in the attitudes of the various circuits. The Third Circuit has now prohibited use of an Allen charge, *United States* v. *Fioravanti*, 412 F. 2d 407 (1969); the Seventh Circuit, *United States* v. *Brown*, 411 F. 2d 930 (1969), and the Fourth Circuit, *United States* v. *Sawyers*, 423 F. 2d 1335 (1970), have required the much more guarded charge recommended by the American Bar Association Project on Standards for Criminal Justice 1969, while the Tenth Cir-

cuit, *United States* v. *Wynn*, 415 F. 2d 135 (1969) has stated that if it be given at all it be incorporated in the body of the original instruction.

In this instance, the petitioner contends that the so called Allen charge given exceeded its acceptable use and that review should be granted in order to define its permissible boundaries. In this case, the full text of the Trial Court's distorted version of the Allen charge reads as follows:

> "Mr. Zaharuk and ladies and gentlemen of the jury, I understand from the note that you have been unable to reach a verdict.
>
> This case has only taken one day to try and if you cannot agree on a verdict, it will mean that a new trial will be necessary, with duplication of time and effort of everyone involved. There appears to be no reason to believe that the case can be again tried more expertly or expeditiously than it has been on either side.
>
> While undoubtedly the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions cannot be changed by conference in the juryroom. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among jurors. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the juryroom with a blind determination that the verdict shall represent his opinion of the case at that moment or that he should close his ears to the arguments of men and women

who are equally honest and as intelligent as himself.

I also caution you, however, that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of the evidence. Remember also that after full deliberation and consideration of all the evidence it is your duty to agree upon a verdict if you can do so without violating your individual judgment and your conscience. Consequently, it is only 20 after 4 and I will have to ask you to retire to the juryroom to continue your deliberations and carefully reexamine and reconsider all the evidence bearing on the questions brought before you.

Mr. Clerk, would you return the jury to the juryroom."

The charge as given must be taken as a fair example of the unguarded verbiage which requires review. Review can be considered under two aspects—the effect which the charge taken as a whole produced upon the jury and an analysis of the various parts of which it is constituted. Either approach clearly reveals that the charge as given is coercive. In this instance especially, the original language of the Allen charge approved by the Supreme Court has not been paraphrased but has been contorted.

The very first sentence of the Trial Court's charge contains an "untruth", namely, the admonition that "a new trial will be necessary" if the jury fails to reach a verdict. As the dissenting opinion in *United States* v. *White*, 382 F. 2d 445 (7th Cir. 1967), states at p. 450:

> "The statement is untrue for the government may decide not to retry the case. Because of its misleading effect, the sentence should be replaced by one suggested by Judge Mathes or its equivalent,

> (127 F. R. D. at p. 102): 'If you should fail to agree on a verdict, the case is left open and undecided.' Like all cases, it must be disposed of."

This particular error as well as others contained in this charge are in use throughout the various circuits today. In *Huffman* v. *United States*, 297 F. 2d 754 (5th Cir. 1962), at p. 758, Judge Brown, in his concurring opinion, stated:

> "The judge was laboring under a basic misapprehension: that a criminal trial must end with (1) a verdict of guilty or (2) a verdict of not guilty. What he overlooked was that failure to agree at this trial is, at least momentarily, a victory for the defense and a legitimate end of the trial."

In *United States* v. *Knaack*, 409 F. 2d 418 (1969), the Seventh Circuit stressed as a determining factor in not reversing that the judge made no reference to the necessity of retrying the case.

The third alternative was not represented in this case. It was ignored. In *Huffman, supra*, Judge Brown said at p. 759:

> "It is simply not legally correct that some jury must decide that the defendant is 'guilty' or 'not guilty'. The fact is, as history reminds us, a succession of juries may legitimately fail to agree until, at long last, the prosecution gives up."

Moreover, in this particular instance, the charge as given is not only inaccurate but it is also coercive in that it unduly stresses the need for unanimity as a duty, where no such duty exists. The first two sentences of the third paragraph and the second sentence of the last paragraph are coercive. The first sentence, by referring to a "verdict" and that "opinions can be changed" is then coupled with the second sentence, which states that "the

very object of the jury system is to secure unanimity" and thereafter the second sentence of the last paragraph of the charge states "it is your duty to agree". As the dissenting opinion in *Jenkins* v. *United States,* 330 F. 2d 220, 222 (D. C. Cir. 1964) states:

> "There is no requirement in law that a jury agree. There is a duty to endeavor to reach a verdict, if agreement is possible, but there is no duty to agree upon a verdict."

Thus, as noted by various jurists: Judge Brown stated in *Huffman, supra,* p. 758, "The court did more than charge the jury that each had a duty carefully to consider opposing views. He charged affirmatively it had a duty to decide". The very object of a verdict is obviously unanimity *per se,* but the object of the jury system is unanimity if possible. In *Fioravanti, supra,* at p. 416, the Court stated: "The possibility of a hung jury is as much a part of our jury unanimity schema as are verdicts of guilty or not guilty." Justice Coleman in *Thaggard* v. *United States,* 354 F. 2d 735 (5th Cir. 1966), at p. 740, stated that:

> ". . . but it is intrinsic in the jury system that a jury may never be found to agree unanimously in the guilt or innocence of a person charged with crime. I have know of many cases that were tried to as many as three juries, but agreement was never reached."

The defendant has an absolute alternative right to a verdict of not guilty. This right to a verdict of not guilty is consequentially interwoven with the possibility of a hung jury. A hung jury is inextricably intertwined with the *quantum* of proof, to wit, proof of guilt beyond a reasonable doubt, so "that a mistrial by a hung jury is a safeguard to liberty". *Jenkins* v. *United States, supra,* and *Huffman* v. *United States, supra.* The Allen charge, since

it is designed to explode the hung jury, denies the defendant the possibility of a hung jury and thus denies him part of his absolute right to a verdict of acquittal. The hung jury is to a verdict of not guilty as a part is to the whole, and to deny the defendant part of that whole is in fact to deny him the right to the whole. In *Huffman* v. *United States,* the Court stated that "failure to agree" at a trial is a "legitimate end to a trial". In *Huffman,* the concurring opinion, p. 758, states that a jury must be "free" and that this freedom is interrelated with the fact that "a succession of juries may legitimately fail to agree until at long last the prosecution gives up". It is this type of freedom and "independence" wherein "liberty is secured". So that a hung jury is indeed a legitimate end to a fair trial.

Moreover, reference made in this instance to duplication of time and effort in the retrial of this action was unwarranted. What system of jurisprudence would equate a defendant's constitutional privileges with a "duplication of time and effort", as stated by the Trial Court. Judge Coleman, in his concurring opinion in *Thaggard* v. *United States,* 354 F. 2d 735, 740 (5th Cir. 1966), states that "expense is never a consideration either to be mentioned or entertained in the dispensation of justice"; *a fortiori,* the same can be said concerning time and effort.

As to the last two sentences of the third paragraph of this charge, which read:

> "It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the juryroom with a blind determination that the verdict shall repre-

> sent his opinion of the case at that moment or that he should close his ears to the arguments of men and women who are equally honest and as intelligent as himself.",

they are indeed coercive by virtue of their total imbalance. Here the Trial Court charges a minority juror to "distrust his own judgment if he finds a large majority of the jury" differs. In the *Allen* case itself, which according to the Court in *Powell* v. *United States,* 297 F. 2d 318, 332 (5th Cir. 1961), approaches "permissible limits", the charge was specifically tailored for both the majority and the minority as it related to acquittal or conviction. The *Allen* charge originally stated:

> "If the much larger number were for conviction, a dissenting juror should consider whether his doubt was reasonable. On the other hand, if the majority was for acquittal, the minority ought to ask themselves whether they may not reasonably doubt the correctness of a judgment which was not concurred in by the majority."

Thus the equation was, when the majority is for conviction, a minority juror should consider whether his doubt as to guilt was reasonable; if the majority was for acquittal, the minority juror could doubt the correctness of his judgment as to guilt. The element of distrust of judgment enters for a minority that wants conviction, not for a minority that wants acquittal, which is connected to *reasonable doubt,* in this charge.

Most significantly, the numbers equals correctness approach should be abolished. As the Court stated in *United States* v. *Fioravanti,* 412 F. 2d 407, 416 (1969).

> "To accept the validity of this reasoning is to assume an inherently faulty major premise: that the majority is right and has reached its preliminary

> inclination by appropriately inspired processes, and that the minority in a given group possesses attributes of spurious rationality."

This is especially true when you consider that the trial court here tells the minority in the third sentence to "distrust" their "judgment if" they find a "large majority" disagreeing with that judgment. The Court in *Fioravanti* continues:

> "But good reason does not depend upon numbers. A quantity of like impressions does not endow a conglomerate with the hallmark of sound judgment. Indeed, as the history of this nation has witnessed, it is often a conscientious and determined minority which proves to be the safeguard against outrageous conduct wrought by tides and currents of public opinion."

The Court then said at p. 417:

> "Thus is revealed the very real treachery of the Allen charge. It contains no admonition that the majority examine its position; it cautions only the minority to see the error of its ways. . . . and substitutes, therefore, a direction that they be influenced by some sort of Gallup Poll conducted in the deliberating room. All of this constitutes an unwarranted judicial invasion into the exclusive province of the jury and adds the blind imprimatur of the trial court to a matter of which it has absolutely no information: the results of the preliminary ballotting in the jury room. To the product of this informal poll is added the gloss of trial judge approval."

The Court continued in the *Fioravanti* case:

> "A syllogism employed by Justice Udall in State v. Voeckall, 69 Ariz. 145, 210 P. 2d 972, 979 (1949)

> (dissenting opinion) aptly illustrates the effect which the Allen charge might well have on the jury: 'The majority think he is guilty; the court thinks I ought to agree with the majority so the court must think he is guilty. While the court did tell me not to surrender my conscientious convictions, he told me to doubt seriously the correctness of my own judgment. The court was talking directly to me, since I am the one who is keeping everyone from going home. So I will just have to change my vote.' "

The Court in *Fioravanti* states:

> "Thus, a judicial barrier should not be erected in the juryroom to discourage free and open discussion."

The decision of the Supreme Court in *Allen* v. *United States* was to serve as a reminder to jurors that "they should listen with the disposition to be convinced to each other's arguments."

The Court stated in *Green* v. *United States,* 309 F. 2d 852, 854 (5th Cir. 1962):

> "The jury system rests in good part on the assumption that the jurors should deliberate patiently and long if necessary and arrive at a verdict—if, but only if, they can do so conscientiously. It is improper for the court to interfere with the jury by pressing a minority of the jurors to sacrifice their conscientious scruples for the sake of reaching agreement."

The Court further states in *Green* at p. 855:

> "There is no legal rule that the majority of jurors have better judgment than the minority. There is

> no legal rule that the minority, merely because they are in the minority, should distrust their own judgment. Such an instruction leads a jury to believe that it is the duty of the dissenting jurors to accede to the majority views without full discussion and without regard to the historical right of a single juror to stick to his conscientious opinion of the case."

The fact that the charge is an unwarranted intrusion in general on jury deliberations has been noted before. It is an intrusion into an area of the constitutional guarantees of the Sixth Amendment.

In *Huffman* v. *United States,* 297 F. 2d 754, 759, the concurring opinion stated:

> "In the final analysis, the Allen charge itself does not make sense. All it may rightfully say is that there is a duty to consider the views of others, but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more, it is a superfluous lecture in citizenship. If it says more to declare that it is a duty to decide it is legally incorrect as an interference with that rightful independence."

The Sixth Amendment commands that in all criminal prosecutions the accused shall enjoy the right to a trial by an impartial jury. As the Court said in *Thaggard,* 354 F. 2d 735 at p. 740, "this means, and ought to mean, a jury free of every influence except the law and the evidence." In *United States* v. *Sawyers,* 423 F. 2d 1335 (4th Cir. 1969), the dissenting opinion at p. 1348 states,

> "the impression upon the minds of the minority was in effect that the judge considered their stance obstructive and was urging them to yield."

The concurring opinion in *Thaggard* v. *United States, supra,* p. 741 states:

> "the essential meaning of Constitutionally guaranteed trial by jury is that once the jury has retired to consider of its verdict it should not be subjected to so much as the appearance of any influence from any source for the purpose of producing a verdict. The jurors should be left to the unhampered expression of their own consciences independently arrived at."

Guidelines in the acceptable limits of the Allen charge are required to restrain the prestigious position of the jurists presiding at criminal trials from interfering with the jury's deliberations.

As stated in *Huffman, supra,* at p. 758:

> "A conscientious citizen serving as a juror wants earnestly to do his duty. He is impressed as he should be by the awesome power and prestige of a United States Judge."

This is indeed highlighted considering what is stated in the dissenting opinion in *United States* v. *Sawyers, supra,* at p. 1345:

> "Of all who come in contact with the jury, the trial judge commands the greatest respect and he is uniquely in a position to influence the jurors.
>
> As Chief Justice Fuller put it in *Starr* v. *United States,* 153 U. S. 614,
>
> 'It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight and that his lightest word or intimation is received with deference and may prove controlling'."

This is especially true in an improperly balanced Allen charge, for it is not addressed to the entire panel but to the minority of the jurors and therefore adds the judge's influence to the side of the majority. In this predicament, minority jurors are likely to develop a sense of isolation and the impression that they are the special objects of the judge's attention. Thus the minority feeling is that the judge is goading them to agree with the majority. Again in *Sawyers*, 423 F. 2d 1335, at p. 1350, the Court stated:

> "In a jury trial however, the jurors are the ones to be convinced, and no constraint upon their independent judgment can be condoned as harmless."

In *Powell* v. *United States*, 297 F. 2d 318 (5th Cir. 1961), directly applicable here, considering the Trial Court's statements in this case, "blind determination" and "close his ears", the Court held that, the Trial Court's addition to the Allen charge of an imputation of stubborness to the jurors opposing the majority went beyond the permissible limits to which a court may go in its endeavor to influence the jury towards the rendition of a verdict.

The connection between the necessity for unanimous verdicts of conviction required in the federal courts and the general presumption of innocence and the desired *quantum* of proof required has been noted by various courts.

> "The question is not whether guilt may be spelt out of the record but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."
>
> *Bollenback* v. *United States*, 326 U. S. 607, 614, (Frankfurter, J.)

Thus, the Allen charge raises the constitutional question of the right to trial by jury which Article III, Sec. 2, Clause 3 of the United States Constitution requires. The connection between unanimity and reasonable doubt is likewise obvious. The Court in *Fioravanti*, 412 F. 2d 407 (1969) stated Allen's "effect on the necessity for proof beyond a reasonable doubt makes it doubly circumspect." The requirements for a unanimous jury verdict for criminal cases in federal courts, *Thompson* v. *Utah*, 170 U. S. 343, is eloquent testimonial that: "something more than a majority vote is desired."

Thus, in *Hibdon* v. *United States*, 204 F. 2d 834, 838 (6th Cir. 1953), the Court stated:

> "The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof, for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt."

In *Billeci* v. *United States*, 184 F. 2d 394, 403 (D. C. Cir. 1950) the Court stated:

> "an accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned."

As the Court states in *Fioravanti*, *supra*, at p. 419:

> "where a verdict of guilty is generated by the process of being influenced by preliminary vote of the majority instead of subjective convincement beyond a reasonable doubt . . . we have a serious question

> that the charge may have become constitutionally delinquent in derogation of defendant's traditional right of trial by jury."

The Court also stated in *Fioravanti*:

> "Under any standard other than an individual juror's determination, would not 'the doubt of a single juror in the face of eleven votes for conviction' be per se unreasonable." Moore's Federal Practice, Vol. 8, Par. 31.-04, pp. 31-7.

As the concurring opinion in *Thaggard* v. *United States, supra,* states at p. 741, the meaning of Article III, Sec. 2, Clause 3 of the United States Constitution is "a jury free of every influence except the law and the evidence."

In conclusion, the Allen charge skirts the limits of permissible boundaries. In *United States* v. *Rogers,* 289 F. 2d 433, 435 (4th Cir. 1961), the Court stated:

> "The charge approved in Allen approaches the limits to which the court should go in suggesting to jurors the desirability of agreement and avoidance of the necessity of a retrial before another jury. If it went much further, or if it were stripped of its complementary reminder that jurors were not to acquiesce in the views of the majority or to surrender their well-founded convictions conscientiously held, it might readily be construed by the minority of the jurors as coercive, suggesting to them that they should surrender their views in deference to the majority and concur in what really is a majority rather than a unanimous verdict."

And at p. 436, the Court went on to say:

> "Without reference to both sides of the coin, a strong statement of the duty of agreement may read-

> ily be concluded by those jurors in the minority as requiring a deferential surrender to the views, however unreasoned they may be, of the majority."

Thus, based upon the foregoing, there is a trend in the various circuits to sparingly use the Allen charge and, if used, to use in lieu of the Allen charge that charge recommended by the American Bar Association Project on Minimum Standards for Criminal Justice and the Committee on the Operation of the Jury System of the Judicial Conference of the United States, with the further preference that it be given in the original charge. The original charge includes the statement in Subdivision V that:

> "each juror who finds himself in the minority shall consider his views in the light of the opinions of the majority and each juror who finds himself in the majority shall give equal consideration to the views of the minority."

There is no mention of duplication of time, effort or expense or that the minority should distrust its judgment. Likewise, other circuits have recommended that, if there be a supplemental charge, they use the charge in Mathes and Devitt, Federal Jury Practice and Instruction, Sec. 7.01. This also has a balance between majority and minority without mention of time, expense, effort or that the minority should distrust its judgment.

In this instance, we have a classic example of overextension of the charge. The courts are increasingly turning towards the feeling that "expansion" on the Allen charge, "although well-intentioned", is "objectionably constraining", and that "an unaccented and unembellished" Allen charge is "quite bold enough". *United States* v. *Smith*, 303 F. 2d 341, 343 (4th Cir. 1962). Finally, as stated by Judge Brown concurring in *Huffman, supra,* at p. 756,

which directly and clearly relates to the specific charge in question,

> "The charge as here given reveals that the Judge was subjecting this jury to pressures and coercion of a kind never for a moment intended by the Allen charge. Indeed the departure from Allen is so marked that whatever limited use ought ever to be allowed or made of it when carefully circumscribed must be forfeited by the misguided offhand elaborations of it as here declared."

It is ironical to consider that the charge given in this case contravenes the very norms set by the Second Circuit itself in *United States* v. *Kenner*, 354 F. 2d 780, 783 (2nd Cir. 1965). The full third paragraph of the modified Allen charge read to the jury by the Trial Court is verbatim in this case with that reviewed by the Second Circuit in *Kenner*. Unlike this case, the Trial Court in *Kenner* pointedly added the following:

> "I don't mean by reading this charge to coerce some juror who feels that he or she is of this opinion or that but certainly the advice of the Supreme Court should be heeded.
>
> It may be you can agree on some of the counts and not on others, but whatever is the ultimate decision, we will accept it.
>
> I am going to ask you to go back and try again and if you can't agree, that is it, we have to quit."

In reviewing this charge the Second Circuit categorically stated:

> "We have had grave doubt as to whether the charge thus given was not unduly coercive. We have concluded that the case is saved from re-

> versal by the barest margin, the margin provided in these circumstances, and in this context, by the judge's disclaimer of intention to 'coerce' and by his expression of willingness to accept 'the ultimate decision' whatever it might be."

However, in this case although the charge given was identical to that in *Kenner*, there was no saving device as to the judge's dislaimer of intention "to coerce" or by his expression of willingness to accept "the ultimate decision" whatever it might be.

The Trial Court in this case did not inform the defendant of its intention to give the Allen charge, and after the charge was given the Court did not ask for objections but immediately after giving the charge, directed the clerk to return the jury to the juryroom, giving no opportunity for defense counsel to object. See contra this procedure. *Williamson* v. *United States*, 365 F. 2d 12 (5th Cir. 1966). In *Huffman* v. *United States, supra*, at p. 756, the concurring opinion stated:

> "If there ever was a place for the plain error of *Federal Rules of Criminal Practice*, 52, this should be it. This is the judge speaking. He is speaking not on the substantive merits on the case. He is speaking about developments subsequent to submission of the cause. He alone has determined that the time has come for an admonition to the jury. When it is done, it is too late to undo it. Nothing, absolutely nothing he may say can really correct this, if (a) the time was inopportune or (b) the content or method of supplemental instruction is significantly faulty. Consequently, this ought to be viewed just as though counsel, instead of acquiescing, had gone through the formality of accepting."

In summary, it can be stated that the Allen charge given in this case constituted reversible error because of the following factors. It contains the misstatement of fact that failure to agree will result in the necessity of a retrial of the defendant; it stresses disproportionately the time and expense of such retrial; it poses a false dichotomy that the defendant must be found either guilty or innocent by the jury, not allowing for disagreement; it contains a majority/minority imbalance stressing that the opinion of the majority is more worthy of credence on the subject of guilt; it is an unwarranted intrusion on the part of the jurist presiding in favor of the majority and of rendering a decision of guilty or not guilty; and finally its use is in conflict between the various circuits, and its use here was in conflict with the very norms and standards set for the charge in this very circuit, thus indicating in all the need for review.

The charge given was highly coercive and strongly prejudiced the rights of the defendant. Therefore, this Court should review the bounds and limits of the present day Allen charge.

CONCLUSION

For all of the reasons set forth above, it is respectfully submitted in the interests of the right to trial by jury, the right to trial by an impartial jury, and the right to a fair trial, this Petition for Writ of Certiorari should be granted, especially since the affirmance below is palpably erroneous and tenable.

Respectfully submitted,

PAUL P. RAO, JR.,
Attorney for Petitioner.

APPENDIX TO PETITIONER'S BRIEF

APPENDIX A

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of June one thousand nine hundred and seventy-two.

Present:

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. JAMES L. OAKES,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD HOFF,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX B

Statutes

United States Constitution—Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

United States Constitution, Sixth Amendment

JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Article III, Sec. 2, Clause 3

CRIMINAL TRIAL BY JURY.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in

the State where the said crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

---

18 U. S. C. §659

INTERSTATE OR FOREIGN BAGGAGE, EXPRESS OR FREIGHT; STATE PROSECUTIONS

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. June 25, 1948, c. 645, 62 Stat. 729; May 24, 1949, c. 139, §13, 63 Stat. 91.

---

28 U. S. C. §1254(1)

"Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 52(b)

HARMLESS ERROR AND PLAIN ERROR

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-37

RICHARD HOFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having knowingly possessed goods stolen from a foreign shipment, in violation of 18 U.S.C. 659. He was sentenced to one year's imprisonment. The court of appeals affirmed without opinion (Pet. App. A1).

1. The evidence showed that on July 27, 1971, sixty-seven cartons of ladies knit pullovers, part of

a shipment from Hong Kong to New York City, were stolen from a pier in Staten Island, New York (Tr. 21; G.X. 3).[1] Each carton was valued at $147.64 (Tr. 21; G.X. 3). On August 4, 1971, F.B.I. agent Colgan went to Glow Distributors in Manhattan. He informed petitioner that he had a search warrant for Room 501, 49 West 27th Street, located about 100 yards around the corner from Glow Distributors, and asked petitioner if he had a key to the room (Tr. 10-11). Petitioner said that he did not have a key and that he had no knowledge of the room (Tr. 11). A locksmith opened the door to Room 501 and agent Colgan found and seized numerous cartons of merchandise including 11 cartons of the stolen pullovers and 38 cartons containing stolen flashlights (Tr. 13-15).

The manager of the building, Robert Cohen, testified that petitioner and his brother had previously asked him whether he had some place they could rent for warehousing merchandise (Tr. 22-23). Cohen had showed them Room 501, and, after they agreed that the room met their needs, Cohen had prepared a lease application dated February 24, 1971, based on information supplied by petitioner (Tr. 23-24). Petitioner at that time told Cohen to put down the name of Peter Gordon as lessee and gave 170 West 78th Street, New York City, as Gordon's address (Tr. 25; G.X. 4). The rental agent for the building located at 170 West 78th Street testified that no one named

[1] "Tr." refers to the trial transcript, which we are filing with the Clerk of this Court. "G.X." refers to the government's exhibits.

Peter Gordon lived there during the entire calendar year 1971 (Tr. 36).

After Cohen prepared the lease for Room 501, he delivered it to petitioner or petitioner's brother at the "Glow store" (Tr. 27). The lease was returned to Cohen signed "Peter Gordon," together with payment in cash for the security and a month's rent, less a deposit of $100 previously paid to Cohen by petitioner (Tr. 26-28). The lease indicated that the room would be used for the storage and shipping of radios and clothing (Tr. 28-29; G.X. 6). Each month from March to July 1971, Cohen collected the rent for Room 501 from petitioner or petitioner's brother and it was always paid in cash (Tr. 29). Cohen never dealt with or met anyone named Peter Gordon (Tr. 30).

A locksmith, Arthur Gatling, testified that in February 1971 he was sent to Glow Distributors where petitioner told him that he wanted a lock installed in Room 501 (Tr. 37-38). After Gatling installed the lock, he gave the keys to petitioner who paid him for this work (Tr. 37-41).

Also introduced into evidence was petitioner's grand jury testimony, dated September 30, 1971, denying that he had rented any space at 49 West 27th Street, denying any knowledge of a room at that address, denying that a lock had been installed in Room 501, denying that he paid rent on Room 501, denying that he knew Robert Cohen, and denying that he used the name "Peter Gordon" (Tr. 45; G.X. 8).

Petitioner testified at trial that he did not rent space at 49 West 27th Street, but that a person whom

he knew as Peter Gordon came to him in February 1971 and asked about space available for rent. Petitioner looked for the space, talked to an agent and gave the agent $100 as a deposit on a loft. Petitioner agreed with Gordon to pay the rent on the loft and to deduct the rent from money he owed Gordon for merchandise. Petitioner claimed that he gave the lease to Gordon. With respect to the lock installation, petitioner testified that Gordon requested that the lock be installed. Petitioner took care of the installation and gave the keys to Gordon. Petitioner was unable to provide Gordon's address or telephone number (Tr. 52-69).

Norman Brill, a local merchant, testified that he met a person named Peter Gordon and had spoken to him on two occasions in February and March or April 1971 (Tr. 92-93). On the second occasion, Brill testified that Gordon said he had a loft in the neighborhood (Tr. 93-94).

2. At the trial the government attempted to introduce the stolen flashlights as evidence of similar acts (Tr. 15-17; G.X. 2). The trial court sustained petitioner's objection to this evidence, stating that "[i]f [the prosecutor] thought they were stolen, [he] should have indicted [petitioner] for them at the same time. This is not a prior similar act" (Tr. 16-17). Later in the trial, the government called a retired United States Customs Officer to testify as to a prior similar act involving petitioner (Tr. 46). The officer gave only his name and former occupation before petitioner objected and requested an offer of proof (Tr.

46-47). At the side bar, out of the hearing of the jury, the government explained that the testimony of the former customs officer and subsequent witnesses would establish that approximately ten months before the crime charged in the instant indictment, a large quantity of stolen merchandise was found in petitioner's store (Tr. 47-48). The court sustained petitioner's objection to this proffered testimony after being informed that the grand jury had declined to indict petitioner for this act (Tr. 48-49).

Petitioner contends that these offers of proof were highly prejudicial and deprived him of a fair trial (Pet. 5). The trial court, however, upheld petitioner's objection to this proof and excluded all evidence of similar acts. In its charge, it instructed the jury to disregard questions and allegations as to facts contained in questions to which the court had sustained objections (Tr. 149). Moreover, on this record the testimony of the former customs officer was unenlightening to the jury on the matter of the commission of another crime. Under these circumstances petitioner was not prejudiced by the government's offers of proof of similar acts.

3. The jury retired at 11:57 a.m. to deliberate (Tr. 154). At 4:05 p.m. the jury reported that it was unable to reach a verdict (Tr. 156). The court then gave the jury a modified "Allen Charge," set forth at Pet. 20-21 (Tr. 156-157). At 4:20 p.m. the jury returned to the juryroom to continue its deliberations, and at 6:50 p.m. it returned a verdict of guilty (Tr. 157-159).

Petitioner contends that the supplemental instructions were prejudicial and coercive (Pet. 19). The instructions given by the trial judge, however, emphasized that no juror was expected to yield a conscientious conviction (Tr. 157), and that it was their duty to agree upon a verdict only if they could do so without violating their individual judgment and conscience (Tr. 157). See *United States* v. *Meyers*, 410 F.2d 693 (C.A. 2), certiorari denied, 396 U.S. 835. Moreover, the supplemental instruction was not coercive in effect, as evidenced by the jury's continued failure to agree on a verdict for another two and one-half hours. See *Meyers, supra.* The poll of the jurors confirmed that each juror in his own right determined that petitioner was guilty (Tr. 159).

This Court has consistently declined to review recent decisions in the various circuits regarding the propriety of a supplemental instruction to juries experiencing difficulty in reaching a verdict. Although several circuits, including the Second, have recently determined, under their supervisory authority, that the traditional *Allen* instruction (*Allen* v. *United States*, 164 U.S. 492) should be modified or eliminated in the future,[2] no court of appeals has held that such a supplemental instruction is *per se* coercive or constitutes reversible error.

---

[2] See, *e.g.*, *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017; also see *United States* v. *Thomas*, 449 F. 2d 1177 (C.A. D.C.) (*en banc*). The instructions in this case follow those approved by the Second Cir-

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

---

cuit. See *United States* v. *Barash*, 412 F. 2d 26, certiorari denied, 396 U.S. 832; *United States* v. *Bowles*, 428 F. 2d 592, certiorari denied, 400 U.S. 928; *United States* v. *Hynes*, 424 F. 2d 754, certiorari denied, 399 U.S. 933; *Meyers, supra.*

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 474364 79